No. 1040

IN THE

Supreme Court of the United States

October Term, 1991

PENTHOUSE INTERNATIONAL, LTD.,

Petitioner,

against

EDWIN MEESE III, Attorney General of the United States, HENRY E. HUDSON, DR. JUDITH VERONICA BECKER, DIANE D. CUSACK, PARK ELLIOTT DIETZ, JAMES C. DOBSON, EDWARD J. GARCIA, ELLEN LEVINE, HAROLD (TEX) LEZAR, REV. BRUCE RITTER, FREDERICK SCHAUER and DEANNE TILTON-DURFEE, Members of the Attorney General's Commission on Pornography, and ALAN EDWARD SEARS, Executive Director of the Attorney General's Commission on Pornography,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEFFREY H. DAICHMAN
GREENSPOON, GAYNIN & DAICHMAN
Counsel for Petitioner
825 Third Avenue
New York, NY 10022
(212) 888-6880

December 20, 1991

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(7326—LC5-169—1991)

Questions Presented

1. Where government officials employ intimidation and coercion by:

(a) threatening to blacklist distributors of constitutionally protected materials,

(b) implying that distributors who do not remove such materials from circulation and sale will be criminally prosecuted, and

(c) suppressing constitutionally protected materials by means of deceit and false representations,

are they entitled to the privilege of qualified immunity?

2. Have government officials exceeded the scope of their discretionary authority, so as to deny them the privilege of qualified immunity, where they employ deceit for the express purpose of suppressing constitutionally protected materials?

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Petitioner Penthouse International, Ltd. prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 19, 1991, as amended on August 27, 1991.*

*Petitioner's parent company is General Media Publishing Group, Inc. Petitioner has no subsidiaries.

The Court of Appeals viewed as a "constitutional issue of first impression" (160) the government's right to criticize publications it disapproves of, even where such conduct amounts to outright censorship. The decision of the court below approves the use of coercion and blacklisting as a means of informal governmental censorship, undermines the principle behind *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), and permits government officials to engage in deliberate suppression and restraint of constitutionally protected materials with impunity.

Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit, as amended, is reported at 939 F.2d 1011, and appears in the Appendix hereto at 1a.

Jurisdiction

The opinion of the Court of Appeals for the District of Columbia Circuit was entered on July 19, 1991. A timely petition for rehearing *en banc* was denied on September 24, 1991 (21a-24a). This Court's jurisdiction is invoked under 23 U.S.C. §1254(1).

Constitutional Provision Involved

The First Amendment to the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech or of the press. . ."

Statement of the Case

This is a constitutional tort action for money damages, brought under the doctrine of *Bivens v. Six Unknown*

Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), by the publisher of *Penthouse* magazine. The defendants include the eleven individual members of the Attorney General's Commission on Pornography (the "Commission" or "Meese Commission") and the Commission's Executive Director.

The Meese Commission was established on February 22, 1985, pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. §1 *et seq.* and was disbanded by Attorney General Meese after issuing its Final Report in July 1986.

The Commission's charter describes its purpose "to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees" (2a).

Straying from this limited mandate, however, the Commission embarked upon a course of conduct deliberately designed to cripple petitioner's financial viability by interfering with its distribution system on a nationwide scale. The single largest retail sales outlet for *Penthouse* magazine was the Southland Corporation, the corporate owner of the ubiquitous 7-Eleven convenience chain. The Commission singled out the Southland Corporation for a particularly intense campaign of censorship by intimidation. One of the Commissioners personally called Southland's General Counsel and Vice President to falsely inform him that in its Final Report the Commission would link the magazines in question to child abuse (4a). This was a rather sensitive issue to Southland because of its concerted and publicly visible efforts to combat child abuse (4a). No such finding

was ever made by the Commission, but its threat surely had the intended impact of limiting the distribution of sexually-oriented but constitutionally protected materials.

The Commission conducted public hearings across the country, during which it received testimony from some 200 witnesses (2a). At one such hearing in Los Angeles on October 17, 1985, a written statement was submitted by Reverend Donald Wildmon, Executive Director of the National Federation of Decency and a well-known religious zealot.[1] In his statement, Reverend Wildmon accused several well-known corporations of distributing "pornography," which in his view included *Penthouse* magazine (3a). Acting as the instrument for Reverend Wildmon and others who share his convictions, the Commission achieved what years of organized protests had failed to accomplish—causing retailers such as Southland Corporation to discontinue selling *Penthouse* magazine.

Following its clandestine telephone call to Southland, the Commission mailed a letter dated February 11, 1986, to Southland Corporation and twenty-two other leading distributors and retailers who had been targeted by Reverend Wildmon. The letter was sent on the stationery of the United States Department of Justice, which includes its official seal, and stated (3a-4a):

> Authorized Representative:
>
> The Attorney General's Commission on Pornography has held six hearings across the United States

[1]For years, Reverend Wildmon has spearheaded organized protests aimed at destroying the distribution of constitutionally protected materials of which he and his followers disapprove. His boycotts and picketing, however, had no discernible impact upon the sales of *Penthouse* magazine, until he was able to influence the Commission to take certain actions.

during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.

You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.

Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions.

Thank you for your assistance.

Truly yours,
s/Alan E. Sears
Alan E. Sears
Executive Director

enc: Self-Addressed
Postage Paid Mailing Label

Attached to the letter was the prepared statement submitted by Reverend Wildmon to the Commission (3a), but neither the letter nor its attachment revealed that the source of the statement was Reverend Wildmon. The attached statement was entitled "Pornography in the Family Marketplace" and provided in part as follows:

> The general public usually associates pornography with sleazy porno bookstores and theatres. However, many of the major players in the game of pornography are well-known household names. Few people realize that 7-Eleven convenience stores are the leading retailers of porn magazines in America.
>
> Indeed, 7-Eleven is perhaps the most important key to successful marketing of pornography in the family marketplace. In my opinion, should 7-Eleven discontinue the sale of porn magazines, both Playboy and Penthouse would be seriously crippled financially . . . Erwin Billman, then Executive Vice President of *Penthouse* magazine, testified that Southland Corporation (7-Eleven) was the single most important outlet for the sales of *Penthouse* magazine . . .
>
> * * *
>
> Pornographic magazines rely heavily for their circulation on single-issue or over-the-counter sales in addition to subscriptions. Therefore their display at newsstands and in stores is vital to their existence. In fact, the subscription market of *Penthouse* magazine *amounts to only 5 percent of total sales.* Only 202,807 subscribed to *Penthouse* magazine during the last half of 1984, but 3,568,517 were purchased monthly over the counter. . . .

The anonymous statement expressly characterized petitioner's magazine as "pornographic," singled out Southland Corporation as "the leading retailers of porno magazines in America" and predicted that "should 7-Eleven discontinue the sale of porno magazines, both Playboy and Penthouse would be seriously crippled financially." The clear focus of the letter was to emphasize that an apparently authoritative

source had identified the addressee as a purveyor of "pornography" and that the Attorney General, through his Commission, would issue a blacklist consisting of a "final report section on identified distributors."

After receiving the Commission's letter, Southland Corporation, Rite Aid Drug Stores, Revco, Thrifty Drug, Dart Drug and others discontinued selling *Penthouse* magazine as well as other publications. The chilling effect of the letter even caused them to discontinue the sale of magazines of a non-explicit nature, such as *American Photography* and *Texas Monthly*. These retail chains, which franchised or operated thousands of stores nationwide, were careful to immediately inform the Commission of their "corrective" action. Thus, in order to avoid being blacklisted, they stopped selling the magazines.

The Commission's threats of public denunciation and opprobrium achieved the intended results. In the minds of these retails outlets, and the public generally, the fear of being branded a purveyor of "pornography"[2] would be ruinous to their business—the "fear of community hostility and economic reprisals," *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1968), plainly outweighed the lost revenues that would result from dropping *Penthouse* magazine. Of course, the financial consequence to petitioner was disastrous.

Implicit in the acts of the Commission was the promise to retailers that if they discontinue selling *Penthouse* magazine, they would not be listed in the Commission's Final Report and need not fear public recrimination. Understandably, there was widespread and immediate reaction to the threat of blacklisting and of criminal prosecution.

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[2]In its Final Report at p. 228, the Commission acknowledged that "[t]o call something 'pornographic' is plainly, in modern usage, to condemn it. . . ."

Because the letter was on Department of Justice stationery containing the official seal of the United States of America, this communication was reasonably viewed as a threat of prosecution by the nation's highest law enforcement authority. For example, Time, Inc. responded by objecting to the "serious accusation" by the "U.S. Department of Justice" and Kable News Company noted that the letter unfairly creates the impression of a "criminal complaint or charge filed," citing the protections of the Sixth Amendment.

Despite years of uninterrupted sales of petitioner's magazines, the Meese Commission's letter and threat of a blacklist caused numerous retail chains across the nation to precipitously drop *Penthouse* magazine, resulting in a drastic and continuing loss of sales revenues amounting to millions of dollars. Their fear of official action remains unabated due to the failure of the judicial system to denounce the Meese Commission's conduct as unconstitutional or to reaffirm the clearly established law intended to prevent this brand of governmental suppression.

Petitioner commenced this action in the United States District Court for the Southern District of New York on May 15, 1986, and on June 2, 1986, upon motion of the respondents, it was transferred to the United States District Court for the District of Columbia, where a similar lawsuit had been commenced by Playboy Enterprises, Inc.

On July 3, 1986, the district court granted Playboy a preliminary injunction, finding that "[t]he letter exceeded the objectives and scope of the Commission," "it seems more than ironic that many of the decisions not to sell were made *after the Commission's letters were sent out*" (emphasis in original) and "for at least some of the distributors, the concern over having their names published in the Commis-

sion report compelled them to withdraw the sale and distribution of some of plaintiff's magazines and books." *Playboy Enterprises, Inc. v. Meese,* 639 F. Supp. 581, 585, 587, 588 (D.D.C. 1986).[3] The district court stayed all discovery and consolidated petitioner's case with the Playboy action for purposes of summary judgment. Then, four years after it had issued a preliminary injunction, the district court granted summary judgment dismissing the case in its entirety. *Playboy Enterprises, Inc. v. Meese,* 746 F. Supp. 154 (D.D.C. 1990).

Despite the Meese Commission's explicit threat to publish a blacklist and implicit threat of criminal prosecution, despite the overwhelming response withdrawing petitioner's constitutionally protected publications from sale, and despite the unrefuted allegations that the Commission sought to intimidate the Southland Corporation by outright deceit, the Court of Appeals affirmed summary judgment based on the qualified immunity privilege, reasoning that the Commission's conduct was mere "criticism" which did not "threaten[] anyone's First Amendment rights" (9a). In reaching this conclusion, the Court of Appeals failed to recognize that the line separating mere "criticism" from informal censorship was crossed in this case by the threat of a blacklist from the Department of Justice.[4]

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[3]The letter of "withdrawal" ordered by the district court had absolutely no impact on reinstating *Penthouse* magazine in any of the stores which had discontinued its sale as a result of the February 1986 letter.

[4]The question posed by the Court of Appeals suggests its own answer: "the scope of the government's right to speak where the exercise of that right has the effect of informal censorship, chilling constitutionally-protected speech" (16a-17a). Although the court below characterized that question as "a constitutional issue of first impression" (16a), it recognized the inescapable conflict of its holding with established constitutional precedent when it amended its opinion to substitute "discourages" (20a) for the reference to "informal censorship, chilling constitutionally-protected speech".

REASONS FOR GRANTING THE WRIT

I.

The decision below renders government officials immune from a damages suit when they exercise their coercive power to achieve censorship and suppression.

The decision below is a radical departure from well settled constitutional principles prohibiting governmental suppression by the use of intimidation and coercion. Permitting government officials to censor speech with which they disagree poses a grave threat to the First Amendment. Thus, "the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. New York State Crime Victims Board*, ___ U.S. ___, 60 U.S.L.W. 4029, 4032 (Dec. 10, 1991). The conduct of the respondents in this case cannot be disguised as mere "criticism" or efforts to "embarrass" (8a-9a) when they intentionally used the coercive power of their official status to achieve the goals of suppression and restraint of speech they did not like or they did not think to be in the best interests of America.

Since the decision in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), courts have been vigilant to protect against informal government censorship of speech. See, e.g., *Council for Periodical Distributors Ass'n v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd*, 827 F.2d 1483 (11th Cir. 1987); *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228 (4th Cir. 1970); *ACLU v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984). The longstanding philosophy behind *Bantam Books* and its progeny is that constitutional freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S.

516, 523 (1960). "What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, ____ U.S. ____, 110 S.Ct. 2729, 2739 (1990).

The decision below reflects an improvident retreat from that position, essentially undermining the philosophy behind *Bantam Books* and in one fell swoop, under the guise of government "criticism," completely erasing the prohibition against government blacklists of constitutionally protected material. This is not a case of mere criticism of "ideas" or "the speech's content," *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986), but rather the wholesale censorship of the speech itself by threatening to blacklist.[5]

The court below believed that "these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate" (8a). But this is precisely the vice this Court found unconstitutional in *Bantam Books*. Petitioner's material falls outside of the regulations of the obscenity laws, yet the Meese Commission determined to suppress these publications by means of informal censorship, therefore sidestepping all of the legal rights, protections and defenses that would otherwise be available in an obscenity prosecution. To paraphrase this Court's ruling in *Bantam Books*, "[i]t would be naive to credit the . . . assertion that these black-

[5]Although the court below relied upon *Block v. Meese*, that case was decided in June 1986 and therefore can have no bearing on the objective reasonableness of the respondents' conduct in February 1986. The relevant question is whether the law was clearly established "at the time an action occurred." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

lists are in the nature of mere" criticism, "when they plainly serve as instruments of regulation independent of the laws against obscenity." 372 U.S. at 68-69.

By failing to draw the line between criticism and suppression, the court below endorsed the use of governmental coercive power to effect a prior administrative restraint. As Justice Scalia observed in *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986):

> The line of permissibility, we think, falls not between criticism of ideas in general and criticism of the ideas contained in specific books or expressed by specific persons; but rather between the disparagement of ideas (general or specific) and the suppression of ideas through the exercise or threat of state power. If the latter is rigorously proscribed, *see Bantam Books, Inc. v. Sullivan*, 372 U.S. at 72, 83 S.Ct. at 640, the former can hold no terror.

Given the blatant threat to blacklist distributors of petitioner's constitutionally protected magazines, the conclusion by the Court of Appeals that no "clearly established" rights were violated for purposes of the qualified immunity defense (10a) is incongruous. It is also unconstitutional "[i]n a society that abhors censorship." *Rust v. Sullivan*, ___ U.S. ___, 111 S.Ct. 1759, 1788 (1991) (Stevens, J., dissenting). The Commission's use of threats and intimidation amounts to "raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press." *Simon & Schuster, Inc. v. New York State Crime Victims Board*, ___ U.S. ___, 60 U.S.L.W. 4029, 4035 (Dec. 10, 1991) (Kennedy J., concurring).

The Court of Appeals, however, was not content to rest its holding on the finding that the law was not "clearly established," but pushed constitutional liberties over the precipice by concluding that government officials may even engage in conduct "designed, or intended, or motivated, to discourage the distribution of *Penthouse*" (12a). The undisputed evidence established that the Commission resorted to lies and deceit to advance its campaign of informal censorship, i.e., when an unidentified Commission member falsely informed the Southland Corporation that the Commission would find a causal connection between magazines such as *Penthouse* and child abuse, and when it followed this with its letter threatening to blacklist distributors who did not cooperate by removing the magazines from sale.

But deliberate conduct which has the effect of suppressing speech is patently unconstitutional under clearly established law.[6] As Justice Scalia wrote in *Block v. Meese,* 793 F.2d 1303, 1311 (D.C. Cir. 1986), the First Amendment is violated when government officials set out " 'deliberately . . . to achieve the suppression' of the films by 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,' *Bantam Books, Inc. v. Sullivan,* 372 U.S. at 67, 83 S.Ct. at 637." The Commission's threat to publish a blacklist is a classic example of "coercion, persuasion, and intimidation" and the overwhelming success of this threat remains unrefuted.[7] Accordingly, the

[6]Petitioner asserted a constitutional tort both in terms of objective unlawfulness and unconstitutional motive on the part of the respondents. *Siegert v. Gilley,* 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds,* ____ U.S. ____, 111 S. Ct. 1789 (1991). Either alternative should have survived the motion for summary judgment.

[7]In a sworn affidavit, the Commission's Executive Director insisted that the Commission never even "contemplate[d]" publishing a blacklist of distributors of pornography—yet its February 1986 letter threatened to do just that in order to accomplish by intimidation what it could not achieve by lawful means.

effect of the decision below is to endorse the use of deceit by government officials to achieve unconstitutional goals. At the same time, it necessarily chills the rights of those who are unable to predict the consequences of failing to appease future public officials or commissions whose legitimate goals have been sabotaged by tactics of censorship and suppression.

By attacking petitioner's chain of distribution, the Commission focused its efforts at the vulnerable point of sale—which, if impaired, would fulfill Reverend Wildmon's prediction that "Penthouse would be seriously crippled financially." Intimidating distributors and retail outlets, however, is no less a First Amendment violation, for "[t]he freedom of expression protected by the First Amendment embraces not only freedom to communicate particular ideas, but also the right to communicate them effectively." *United States v. Eichman*, ____ U.S. ____, 110 S. Ct. 2404, 2412 (1990) (Stevens, J., dissenting); *Ex Parte Jackson*, 96 U.S. (6 Otto) 727, 733 (1877), ("Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.")

The invidious irony of this case is that petitioner was condemned and punished by means of informal censorship, yet the Commission's Final Report never once described *Penthouse* magazine as pornographic or obscene, never linked it to child abuse and never suggested that it is an unlawful or illegal publication.[8] At the press conference presenting the Commission's Final Report, the Chairman publicly stated that the Commission "was not designed to address what would be ordinarily mainstream material"

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[8]*None* of the issues of *Penthouse* magazine which were discontinued by national retail chains following the February 1986 missive or published subsequently has *ever* been found to be obscene or illegal.

and "did not focus its attention on mainstream publications such as Playboy and Penthouse." If those statements were truthful, then the Commission's February 1986 letter, the enclosure to which was primarily aimed at Penthouse and Playboy, was sent to achieve Reverend Wildmon's objective of suppressing the materials he and others deemed objectionable, rather than to further any legitimate work of the Commission. This conduct plainly exposes the respondents to an action for money damages under the *Bivens* doctrine. After all, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982).

II.

The court below decided a constitutional question in a way that conflicts with this Court's prior decision in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).

The purported-distinction of *Bantam Books* by the Court of Appeals (6a-7a) constricts that landmark decision in such a way as to render it ineffective beyond its specific factual context. According to the court below, unless the government official communicates a specific and direct threat to prosecute followed by police visits, he is immune from a *Bivens* claim.[9] The Court of Appeals flatly rejected the argument that the threat to blacklist infringes "anyone's First Amendment rights" (9a). Were this the law, then the notices sent by the Rhode Island Commission to Encourage Morality in Youth, deeming certain books and magazines

[9]But courts have found constitutional violations even where the official conduct was unaccompanied by any threat of criminal prosecution. See, e.g., *Hammond v. Brown,* 323 F. Supp. 326 (N.D. Ohio), *aff'd,* 450 F.2d 480 (6th Cir. 1971); *Penthouse International, Ltd. v. Putka,* 436 F. Supp. 1220 (N.D. Ohio 1977); *Liverright v. Joint Comm. of the General Assembly of Tennessee,* 279 F. Supp. 205 (M.D. Tenn. 1968).

"objectionable" for sale or distribution, would have been legal.

The *Bantam Books* decision may not be applied so narrowly.[10] This Court has recognized the judicial responsibility "to look through forms to the substance" in order to conclude that informal censorship "may sufficiently inhibit the circulation of publications. . . ." 372 U.S. at 67. In *Bantam Books*, this Court concluded that the procedures of the Rhode Island Commission were "radically deficient" because "[t]hey fall far short of the constitutional requirements of governmental regulation of obscenity. We hold that the system of informal censorship . . . violates the Fourteenth Amendment." *Id.* at 71.[11]

So too in this case, the Meese Commission's threats to publish a blacklist of corporations who sell *Penthouse* magazine as distributors of pornography "fall far short of the constitutional requirements of governmental regulation of obscenity." Like a star chamber proceeding, the Meese Commission unilaterally condemned constitutionally protected material as "pornographic"[12] without any regard for the judicial safeguards and standards applicable to an obscenity determination. While such views can legitimately

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[10]Limiting the holding of *Bantam Books* to threats of prosecution ignores the availability of "other means of coercion, persuasion, and intimidation." *Block v. Meese*, 793 F.2d 1303, 1311 (D.C. Cir. 1986), quoting *Bantam Books*, 372 U.S. at 67.

[11]The Court of Appeals felt that *Bantam Books* was distinguishable because there "the Commission viewed its task as the *proscribing* of objectionable publications" (7a) (emphasis in original). But here the Meese Commission likewise believed that it had "both the right and the duty to condemn, in some cases, that which is constitutionally protected. . . ." Final Report at 300 n. 44.

[12]The Meese Commission's Final Report acknowledged that "[t]o call something 'pornographic', is plainly, in modern usage, to condemn it. . . ." Final Report at 228, and that "*governmental* condemnation may act effectively as governmental restraint," citing *Bantam Books*, Final Report at 300 n.442 (emphasis in original).

be expressed by private interest groups, when threats are undertaken by government officials expressing or implying use of their coercive power, that creates a scheme of unlawful suppression. See, e.g., *Hentoff-v. Ichord,* 318 F. Supp. 1175 (D.D.C. 1970).

In the *Bantam Books* case, "the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants." 372 U.S. at 64 n.6. For purposes of the summary judgment motion in this case, it was accepted as true that the purpose and effect of the Meese Commission's conduct was likewise to suppress the sale of *Penthouse* magazine. The principle behind *Bantam Books,* therefore, fully supports the claims asserted here.

Moreover, the case law cautions against a narrow reading of precedent in applying the qualified immunity privilege. The determination of "clearly established law" is not to be made "so narrowly as to require that there be *no* distinguishing facts between the instant case and existing precedent." *Hobson v. Wilson,* 737 F.2d 1, 26 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985) (emphasis in original). Such a rule "would unquestionably turn qualified into absolute immunity by requiring immunity in any new fact situation." *Id.* Only "real and substantial" differences, not "trivial factual distinctions," can establish that a new case differs from existing precedent for purposes of good faith immunity. *Zweibon v. Mitchell,* 720 F.2d 162, 173 (D.C. Cir. 1983), *cert. denied,* 469 U.S. 880 (1984). As Justice Scalia noted in *Anderson v. Creighton,* 483 U.S. 635, 107 S. Ct. 3034, 3039 (1987), defining the contours of a clearly established right "is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." The question for decision is whether respondents' conduct transgressed a clearly established legal *principle,* given the information

they possessed at the time, not whether they invented a different or clever way to violate such a principle. *Hobson v. Wilson, supra,* 737 F.2d at 29.

By artificially distinguishing *Bantam* Books, the Court of Appeals has eroded the fundamental principle for which it stands, namely, prohibiting a system of prior administrative restraints by subtle and indirect means of coercion, persuasion and intimidation.

III.

The court below improperly extended qualified immunity to government officials who exceed the scope of their discretionary authority by using deceit to accomplish their ulterior goal of censorship and suppression.

As this Court held in *Harlow v. Fitzgerald,* 457 U.S. 800, 816, 818 (1982), only those government officials "performing discretionary functions" may be shielded from liability for civil damages—all others are without the benefit of this defense. *Zeigler v. Jackson,* 716 F.2d 847, 849 (11th Cir. 1983) ("In order to establish this good faith defense, a defendant must show that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred"); *Flinn v. Gordon,* 775 F.2d 1551, 1553 (11th Cir. 1985), *cert. denied,* 476 U.S. 1116 (1986); *Briggs v. Goodwin,* 569 F.2d 10, 15 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978) ("official immunity, whether absolute or qualified, extends only so far as the affected government official's authority"); *Cruz v. Beto,* 603 F.2d 1178, 1183 (5th Cir. 1979) (defendants bear the burden of establishing that their challenged actions "were taken in the regular course of discharging [their] official duties").

Petitioner alleged that Southland's decision to discontinue selling *Penthouse* magazine was influenced by a com-

munication from an unidentified Commission member who falsely told a Southland senior executive that the Commission intended to publish a finding linking magazines such as *Penthouse* to child abuse (4a-5a). Spreading false information for the purpose of influencing Southland to remove *Penthouse* from its company stores surely exceeded the Commission's limited mandate "to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees" (2a). It would be irrational to hold that the use of lies and deceit by government officials is a legitimate exercise of their discretionary authority, entitling them to invoke the qualified immunity privilege. Yet that is precisely the effect of the decision below.[13]

The contact with Southland plainly constituted "manifestly *excessive* means" to accomplish any legitimate objective, and this sort of excessive conduct should not be cloaked with immunity. *McKinney v. Whitfield*, 736 F.2d 766, 770 (D.C. Cir. 1984) (emphasis in original). In the context of a summary judgment motion, petitioner's factual allegations must be regarded as true, so that the charge of *ultra vires* conduct cannot be resolved on a motion for summary judgment. *Detro v. Roemer*, 732 F. Supp. 673, 675 (E.D. La. 1990). At the very least, issues of fact were raised

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[13]In a statement attached to the order denying petitioner's motion for rehearing (22a), Circuit Judge Randolph indicated that petitioner did not link the improper telephone call with the argument that the Commission exceeded its authority. However, the specific factual allegations concerning the secret contact with Southland were raised throughout petitioner's briefs to the Court of Appeals, albeit not in the precise context of the Commission's discretionary authority. Nevertheless, the relevant facts and the constitutional issues involved were sufficiently raised below to preserve the argument here. Cf. *Cohen v. Cowles Media Co.*, ____ U.S. ____, 111 S. Ct. 2513, 2517 (1991).

as to this threshold question of whether the respondents acted beyond the scope of their discretionary authority, so as to deny summary judgment and proceed with discovery.

Conclusion

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JEFFREY H. DAICHMAN
GREENSPOON, GAYNIN & DAICHMAN
Counsel for Petitioner
825 Third Avenue
New York, NY 10022
(212) 888-6880

December 20, 1991

APPENDIX

Opinion of the Court of Appeals for the District of Columbia Circuit, dated July 19, 1991

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 15, 1991 Decided July 19, 1991

No. 90-5181

PENTHOUSE INTERNATIONAL, LTD.,
APPELLANT

v.

EDWIN A. MEESE, III, ATTORNEY GENERAL
OF THE UNITED STATES, et al.

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 86-01515)

Jeffrey H. Daichman, with whom *Thomas V. Marino* was on the brief, for appellant. *Peter D. Isakoff* also entered an appearance for appellant.

John P. Schnitker, Attorney, Department of Justice, with whom *Stuart M. Gerson,* Assistant Attorney General, *Jay B. Stephens,* United States Attorney, *Leonard*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Schaitman and *Barbara L. Herwig,* Attorneys, Department of Justice, were on the brief, for appellees.

Before: SILBERMAN, WILLIAMS, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

SILBERMAN, *Circuit Judge*: Appellant Penthouse International, Ltd. (Penthouse) brought this action against then Attorney General Edwin Meese, III and the members of the Attorney General's Commission on Pornography (Commission), seeking equitable and monetary relief for alleged violations of Penthouse's First Amendment rights. The district court granted appellees' motion for summary judgment, dismissing appellant's damages action as barred by qualified immunity and appellant's claims for declaratory and injunctive relief as moot. We affirm.

I.

Concerned with what he perceived as a serious problem of pornography in American society, President Reagan requested that the Attorney General establish a commission to study the matter and advise the Department of Justice as to appropriate remedies. The Attorney General, accordingly, created the Commission on Pornography in 1985, pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 §§ 1-15, "to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." The Commission took testimony from some 200 witnesses at a series of six public hearings around the country, followed by a number of meetings, open to the public, at which Commission members reviewed the testimony, determined the contents, and discussed drafts of the Commission's final report.

One of the witnesses, Reverend Donald Wildmon, Executive Director of the National Federation of Decency, accused a number of well-known corporations of distributing pornography. Reverend Wildmon submitted a written statement entitled "Pornography in the Family Marketplace," setting forth his views about the role of corporations that were "household names" in selling pornographic films, television, and magazines. He asserted that the 7-Eleven national chain of convenience stores was "the leading retailer[ ]" of *Penthouse* and *Playboy,* which he termed "porn magazines," and predicted that the withdrawal of this major sales outlet would financially "cripple" both magazines. After discussion whether to include Reverend Wildmon's testimony in the report, the Commission decided to send a letter to the corporations named by Reverend Wildmon, asking for a response to the accusation. The letter, dated February 11, 1986, which was sent to 23 corporations, included a copy of Reverend Wildmon's testimony, but failed to identify him as its author. The letter stated:

> Authorized Representative:
>
> The Attorney General's Commission on Pornography has held six hearings across the United States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.
>
> You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.
>
> Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions.

Thank you for your assistance.

Truly yours,
s/Alan E. Sears

Alan E. Sears
Executive Director

enc.: Self-Addressed
Postage Paid Mailing Label

The response varied. Time Inc. called the "accusations" "outrageous" and chastised the Commission for relying on "uncorroborated, gratuitous statements" from unidentified sources in what it characterized as a "slipshod and misguided effort." Southland Corporation, owner of the 7-Eleven chain, on the other hand, wrote that since the corporation had decided to stop selling adult magazines in light of the public concern about the effects of pornography it "urge[d] that any references to Southland or 7-Eleven be deleted from [the Commission's] final report."

Southland's decision, Penthouse alleges, was influenced by a telephone call from one of the members of the Commission to the General Counsel and Vice President of Southland, John H. Rodgers.[1] Rodgers declined to identify the Commission member with whom he spoke, but alleged that he or she told him that the Commission believed that *Playboy* and similar magazines were linked to child abuse and the Commission intended to publish this finding in its report. Southland, which had been leading a national campaign to fight child abuse, believed that if the Commission published those views on the connection between magazines sold by Southland and child abuse, the resulting publicity would be embarrassing to Southland, whether or not there was in fact such a link. Penthouse alleges that the Commission member's information was false in two respects—the Commission had found no causal connection between *Playboy* or other such maga-

[1]Penthouse relies on the affirmation of Bruce Ennis, counsel for Playboy, made in opposition to the grant of summary judgment in the Playboy litigation, in support of these allegations.

zines and child abuse, and it had no intention of discussing any such link in its report. Penthouse also claims that the Commission member deliberately spread these allegedly false allegations to Southland with the intention of inducing the company to withdraw as a distributor of *Penthouse*.

Playboy Enterprises, Inc. and Penthouse sought a preliminary injunction against publication of any "blacklist" of corporations which distributed their respective publications and an order withdrawing the Commission's letter, as well as other relief, including a statement from the Commission that it did *not* view their magazines as obscene. The district court granted preliminary relief. *See Playboy Enters. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). The court determined that Playboy had shown that it was likely to prevail on the merits in establishing that the Commission's actions amounted to an informal scheme of government censorship constituting a prior administrative restraint. The court therefore granted a preliminary injunction, requiring the Commission to send a follow-up letter to the named corporations, withdrawing the first letter and stating that no reply to it would be necessary as the Commission had already decided that no corporations would be named in the final report. The Commission complied. The court refused, however, to be drawn further into the dispute—by considering whether or not the publications were obscene or pornographic or preventing the Commission from doing so—and therefore refused further injunctive relief.

The two publications persisted in their claims for permanent injunctive and declaratory relief, as well as with a *Bivens* claim for damages, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Defendants at that point moved for summary judgment asserting the claims for equitable relief were moot and that the damages claim was barred by the doctrine of good faith or qualified immunity because the Commission's action did not violate any clearly-established First Amendment right. Plaintiffs contended that defendants'

conduct is unconstitutional under the principle established in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), and alternatively argued that summary judgment was improper before plaintiffs had the opportunity for discovery regarding defendants' allegedly "unconstitutional motives," to demonstrate that defendants acted with the intent to violate plaintiffs' constitutional rights. Discovery was also necessary, in plaintiffs' view, to resolve the material dispute as to the continuing harm from defendants' letter. The district court granted summary judgment to defendants on all grounds. Penthouse alone appeals the judgment.

II.

Appellant, of course, wishes a determination from the judiciary that the government's conduct was unlawful. Such an opinion, appellant believes, will enable it to persuade retailers who have discontinued selling *Penthouse* to change their minds, and prevent a similar effort in the future which might threaten appellant's circulation. Appellant's primary claim, designed to gain such a determination, is its *Bivens* claim for damages. It is asserted that the Commission sought to prevent ("chill") the distribution of constitutionally protected speech and thereby violated appellant's First Amendment rights. The government has no right to prohibit adult pornography that does not qualify as obscenity, and, in any event, the government may not impose a prior restraint on the distribution even of arguably obscene materials.

Penthouse, as we mentioned, relies on *Bantam Books* to support its claim. In that case, however, the Rhode Island Commission to Encourage Morality in Youth had the authority "to investigate and *recommend the prosecution* of all violations" of state statute. 372 U.S. at 60 n.1 (emphasis added). The notices sent by the Rhode Island Commission specifically stated that the Commission was charged by the state legislature with "prevent[ing] the sale, distribution or display of indecent and obscene

publications," and that copies of the lists of "objectionable" publications were being circulated to "Chiefs of Police" "with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age." *Id.* at 62 n.5. Moreover, the notice informed the recipient that "[t]he Attorney General will act for us in case of non-compliance." *Id.* And the notice was followed by a police visit to the distributors targeted by the Rhode Island Commission. Because the Commission viewed its task as the *proscribing* of objectionable publications—it phrased its notices as orders and followed them up by police visits —the Court thought the plaintiff faced a genuine threat of prosecution and therefore the Commission's enforcement scheme amounted to a prior administrative restraint on publication. *Id.* at 67-72.

In our case, the Advisory Commission had no equivalent tie to prosecutorial power nor authority to censor publications. The letter it sent contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications. Penthouse argues that since the letter was written on Justice Department stationery, used the term "allegations," and contained an instruction to contact an attorney for further information, recipients would reasonably think they were threatened with prosecution—particularly in light of the potential confusion between the terms pornography and obscenity. Indeed, as Penthouse points out, several recipients responded by denying they had engaged in unlawful conduct. It may well be that the Commission came close to implying more authority than it either had or explicitly claimed. Nevertheless—any misapprehensions of recipients notwithstanding—we do not believe that the Commission ever threatened to use the coercive power of the state against recipients of the letter. *Cf. Meese v. Keene,* 481 U.S. 465, 484 (1987) (recipient's perception of the negative connotations of the government's use of a term does not itself cause the government's speech to amount to censorship). And the Supreme Court has never found a government abridgement of First Amendment rights in the

absence of some actual or threatened imposition of governmental power or sanction. *See id.* at 480-83 (1987); *Laird v. Tatum,* 408 U.S. 1, 11 (1972) (First Amendment violations found when "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature"); *see also Lamont v. Postmaster General,* 381 U.S. 301, 305 (1965).[2]

Appellant, employing a number of forceful verbs and adjectives, would have us extend *Bantam Books.* It is argued that the Commission's action "chilled," "intimidated," "condemned," and "censored" distribution of *Penthouse*; the very fact that the 7-Eleven chain discontinued sa... of *Penthouse* proves that the Commission's actions abridged appellant's First Amendment rights. That argument seems to us to stretch too far. We do not see why government officials may not vigorously criticize a publication for any reason they wish. As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate. *Cf. Reuber v. United States,* 750 F.2d 1039, 1059 (D.C. Cir. 1984) (a government actor may openly criticize a study produced by an employee so long as no job-threatening sanction is employed). If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized. *See Block v. Meese,* 793 F.2d 1303, 1312-1314 (D.C. Cir. 1986) (Scalia,

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[2]Appellant also relies on *NAACP v. Alabama,* 357 U.S. 449, 463 (1958), as forbidding "blacklisting" distributors of appellant's magazine. But *NAACP v. Alabama* implicated a separate interest —that against compelled disclosure as an infringement of the First Amendment guarantee of privacy of association and belief— which appellant does not allege to be at issue in this case. Since there is no contention that the anonymity of the distributors of appellant's magazine is at stake (nor do we see how it could be), the line of associational cases is simply inapposite. *Cf. Uphaus v. Wyman,* 360 U.S. 72, 81 (1959) (where list is already publicly available, First Amendment privacy interest is slight).

J.); *cf. Barr v. Mateo,* 360 U.S. 564, 574-75 (1959); *see generally* M. Yudof, *When Government Speaks,* 20-22, 31, 38-44, 55-56, 164-73, 200-07, 259-99 (1983); T. Emerson, *The System of Freedom of Expression,* 698-99, 701-09 (1970).

Whenever a government official criticizes a publication it might be thought that he or she implicitly appeals to the public not to buy, or distributors not to sell, that publication. And if the distributor refuses the appeal and the government official criticizes the distributor for its refusal, it is hard to understand how, and why, that criticism can be banned. The letter, of course, did not go so far as to express the government's (or even the Advisory Commission's) criticism of the companies selling *Penthouse.* But even accepting Penthouse's argument that the letter could be fairly read as a threat to "blacklist" its distributors, this charge with the rhetoric drawn out says nothing more than that the Commission threatened to embarrass the distributors publicly. As we have observed, corporations and other institutions are criticized by government officials for all sorts of conduct that might well be perfectly legal, including speech protected by the First Amendment. At least when the government threatens no sanction—criminal or otherwise—we very much doubt that the government's criticism or effort to embarrass the distributor threatens anyone's First Amendment rights.[3] "[W]e know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content." *Block v. Meese,* 793 F.2d at 1313.

In any event, it is unnecessary to decide whether a government official's appeal to a distributor not to sell a particular publication, backed by no more than a "threat" by the official to characterize the publications with a strong pejorative, could, under any circumstances, violate the First Amendment. Even if it could, and even if the facts

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[3]There is no contention that the threat to blacklist the distributors violated their due process rights. *Cf. Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123 (1951).

of this case were to make out such a cause of action, certainly no court has ever so held. To be sure, in *Hobson v. Wilson* we held that the extensive scheme developed by the FBI to disrupt political activities of certain disfavored groups (COINTELPRO) violated their First Amendment rights of association and speech, 737 F.2d 1, 28 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). In that case, however, FBI agents acted surreptitiously and in disguise to publish pamphlets making false allegations about persons in the target organizations. The government officers were not openly criticizing anyone or any idea; indeed, they were acting as agents provocateurs without disclosing that the government was involved at all. We see *Hobson*, then, as an exception to the general rule we glean from Supreme Court cases, an exception limited to a situation where the government's interest in having its officials able to communicate freely on all sorts of matters is not implicated. That exception does not apply here because there is no allegation that a Commission member said or did anything while purporting to be other than a Commission member. That Southland's general counsel did not identify *which* Commission member made the alleged call seems quite irrelevant. Some of the broad dicta in *Hobson* used in identifying the contours of the constitutional right involved appears to us to have been overtaken and circumscribed by the subsequent Supreme Court case of *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987), which cautioned against describing the asserted constitutional right in overly general terms. In sum, appellees are entitled to immunity from suit for damages for a constitutional tort because "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly* established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added); *see also Harris v. District of Columbia*, No. 90-5281, slip op. at 5-6 (D.C. Cir. 1991).

For that same reason, appellant's procedural argument —that summary judgment was improperly granted

against it before it had an opportunity to pursue discovery concerning the Commission's intent—also fails. Assuming *arguendo* that appellant could show that the Commission members and staff, and even Justice Department employees, deliberately set out to so embarrass or intimidate all Penthouse's distributors to bring about a substantial reduction in the magazine's circulation, we do not see how appellant can recover damages—so long as these officials took no covert, disruptive action, but identified themselves and their speech. Even with those additional facts, it cannot reasonably be said that appellant had a *clearly* established constitutional right to be free of such deliberate and calculated pressure if no threats of legal sanctions were employed. Appellant's reliance on *Hobson* to argue that if the government's motive is to "counter the influence of the target associations," 737 F.2d at 27, there is an "additional basis of liability . . . regardless of whether the law was clearly established," Appellant Br. at 41, is unavailing. Discovery into motive is permissible only when the alleged substantial constitutional violation "turns on an unconstitutional motive," *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, _ U.S. _, 59 U.S.L.W. 4465 (U.S. May 23, 1991). By "turning" on motive, we understand *Hobson* to mean that the alleged conduct, like a discharge of a government employee who was a minority, is not of constitutional concern—indeed it might not even be blameworthy—unless it is alleged that a government official fired the employee because of the employee's minority status. In other words, the act and motive are analytically quite separate and it is only when both coalesce that a constitutional tort occurs. And the motive is not expressed in terms of interference with someone's "constitutional right," which is much too general and vague but rather a more particular motive like firing someone because of his or her skin color which, when combined with the act, as a matter of law constitutes an interference with a constitutional right. Here, by contrast, the government's "motive" is not analytically a separate factor. Nor could

it be. One must assume, as we have indicated above, that the government's speech was designed, or intended, or motivated, to discourage the distribution of *Penthouse*. The actor always can be thought to intend the natural consequences of his act. To ask, therefore, whether the government intended to interfere with appellant's free speech or First Amendment protected interests is to beg the question because all depends on how one defines the First Amendment protected interest. The proper question is whether the appellant enjoys a constitutional right to be free of government criticism that would discourage the distribution of its magazine. If it does not—or at least if the right is not clearly established—the government's motive is irrelevant.

Nor do we believe that the truth or falsity of the statements included in the Commissioner's alleged phone call to Southland's general counsel is a basis for a constitutional tort. One of the purported assertions—that pornography causes child abuse—is not the kind of statement that appears susceptible to a true/false evaluation, and the second—that the Commission would make such a link in its report—appears to be only a prediction. In any event, we very much doubt that a *constitutional* line could or should be drawn between "true" government speech that impacts on the publications or speech of private citizens and "false" government speech of that character.

Appellant also contends that the members of the Commission are not entitled to immunity because the letter suggesting that the Commission might publish a list of distributors in its final report was outside their legitimate investigative mandate. We think this argument without merit. The Commission's charter, which defined the scope of the Commission's inquiry, called for the Commission to make "an examination of the means of production and distribution of pornographic materials" and "the recommendation of possible roles and initiatives that the Department of Justice and agencies of local, State, and Federal government could pursue in controlling, consistent with constitutional guarantees, the production and

distribution of pornography." Given this charter, it could hardly be said that a letter inquiring (however clumsily) into the distribution of pornography is " 'manifestly or palpably beyond the authority [of the Commission].' " *Briggs v. Goodwin,* 569 F.2d 10, 16 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978) (quoting *Spaulding v. Vilas,* 161 U.S. 483, 498 (1896)).

III.

Although Penthouse does not appeal the district court's holding that its claim for a permanent injunction is moot because Penthouse cannot show that it will ever "again be subject to the alleged illegality," *City of Los Angeles v. Lyons,* 461 U.S. 95, 109 (1983), it nevertheless renews its request for a declaratory judgment. Article III case or controversy requirements apply as forcefully, of course, to relief sought under the Declaratory Judgment Act as to any other form of relief. *Golden v. Zwickler,* 394 U.S. 103, 108 (1969). The question for us, then, is whether at the time relief is sought " 'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.*' " *Preiser v. Newkirk,* 422 U.S. 395, 402 (1975) (emphasis by the Court) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941)).

The district court's issuance of a temporary injunction sufficiently responded to the injury for which Penthouse sought equitable relief in its original complaint to raise a real question whether any dispute still remains for the court to adjudicate. When a litigant has already received relief for the injury complained of, no live controversy remains. *See Save Our Cumberland Mountains v. Clark,* 725 F.2d 1422, 1432 (D.C. Cir. 1984). To be sure, the district court's preliminary injunction issued only on behalf of Playboy International Enterprises, and did not specifically refer to Penthouse because Penthouse chose to seek

discovery and therefore refused consolidation with Playboy's suit. Penthouse, nevertheless, obtained the equitable relief it was seeking—the letter to which it objected was withdrawn and the Commission's *final* report was published without listing the distributors of appellant's magazine as "distributors of pornography."

Penthouse relies on *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), to support its argument that the controversy is still alive. *County of Los Angeles* held that a case is moot only when "(1) it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur . . . and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," *id.* at 631 (citations omitted). Since the Commission's dissolution ensures that the violation will not recur, Penthouse rests its argument against mootness on the second part of the test. It asserts that it continues to suffer "considerable reputational and financial injury," because distributors who dropped its magazine in response to the Commission's letter are still refusing to carry the magazine, despite the retraction of the letter by the Commission. Penthouse argues that a declaratory judgment that the Commission's action violated Penthouse's First Amendment rights will mitigate this continuing harmful effect by "help[ing to] allay the concerns of distributors who fear that association with plaintiff's publication may subject them to governmental condemnation or possibly even prosecution."

We are skeptical whether this claimed continuing injury is adequate to keep the controversy alive under *County of Los Angeles*. In all the cases in which this court, (in line with Supreme Court precedent, *see, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984)), has found that the effects of an alleged injury were not eradicated, some tangible, concrete effect, traceable to the injury, and curable by the relief demanded, clearly remained. For example, in *Reeve Aleutian Airways v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989), the reputational injury was a direct effect of the legal action

the government had taken in suspending the company from participating in Department of Defense contracts. Even though the suspension had been lifted, it remained on the books as evidencing a violation of air safety standards, causing a drop in the company's business. In *American Fed. of Gov't Employees v. Reagan,* 870 F.2d 723, 726 (D.C. Cir. 1989), although a newly-issued executive order had superseded the allegedly defective original order, "[i]mportant collateral consequences flowing from the [original] order" kept the controversy alive. There remained an unfair labor practice suit regarding the action the union had taken in unilaterally dropping the parties affected by the original order from membership as a direct response to that original order. And in *Doe v. United States Air Force,* 812 F.2d 738, 740-41 (D.C. Cir. 1987), the effect of the government's allegedly illegal search was not completely eradicated because the government retained a copy of the records seized, even though it did not intend to use them, and a declaratory judgment would afford the tangible relief of the return of the disputed documents. The continuing harm of which Penthouse complains appears to fall short of this type of showing. Penthouse claims that distributors are fearful of prosecution for carrying the magazine. While a controversy is not moot so long as a real danger of prosecution remains, a mere speculative or remote chance of legal action will not suffice. *Clarke v. United States,* 915 F.2d 699, 701-02 (D.C. Cir. 1990) (en banc).

Nor is the claim that distributors fear future government condemnation less speculative. Even if we assume that the Commission's letter was intended to show its disapproval of distributors of pornography (including distributors of *Penthouse* magazine), Penthouse offers no evidence that *any* governmental body continues to wage a campaign to discourage its distributors. So there is no ongoing threat that can account for the distributors' alleged fear of government disapproval. As to the argument that the distributors' fear is a continuing effect of the Commission's original action, Penthouse offers no rea-

son why, if the retraction of the letter and the demise of the Commission itself failed to persuade distributors to return once again to the Penthouse fold, a declaratory judgment would be likely to do so. Appellant has not shown, therefore, that even were it to prevail on the merits, the declaratory relief which it now seeks would actually redress the reputational and business injuries from which it claims to be suffering. It seems highly speculative that any action short of requiring the distributors to carry *Penthouse* would give appellant relief.

Even assuming that there is some trace of a continuing injury sufficient to satisfy Article III, we still must determine whether declaratory relief would be appropriate as an exercise of the court's discretionary, equitable powers. Where it is so unlikely that the court's grant of declaratory judgment will actually relieve the injury, the doctrine of prudential mootness—a facet of equity—comes into play. This concept is concerned, not with the court's power under Article III to provide relief, but with the court's discretion in exercising that power. *See Chamber of Commerce v. United States Dep't of Energy,* 627 F.2d 289, 291 (D.C. Cir. 1980). Declaratory relief, like other forms of equitable relief, is discretionary. *A.L. Mechling Barge Lines v. United States,* 368 U.S. 324, 342 (1961). The Declaratory Judgment Act states only that a court "*may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201 (1988) (emphasis added). Where it is uncertain that declaratory relief will benefit the party alleging injury, the court will normally refrain from exercising its equitable powers. *See In re AOV Indus.,* 792 F.2d 1140, 1147-48 (D.C. Cir. 1986); *Spivey v. Barry,* 665 F.2d 1222, 1235 (D.C. Cir. 1981). *See also Eccles v. Peoples Bank,* 333 U.S. 426, 431 (1948). This is especially true where the court can avoid the premature adjudication of constitutional issues. *See Community for Creative Non-Violence v. Hess,* 745 F.2d 697, 701 (D.C. Cir. 1984). Here we are faced with a constitutional issue of first impression—the scope of the government's right to speak where the exercise of that

right has the effect of informal censorship, chilling constitutionally-protected speech. The Supreme Court has signalled its reluctance to decide this very question, *see Meese v. Keene,* 481 U.S. at 484, while pointing to the troubling implications of limiting the government's free speech rights, *see id.* at 484 n.18. We should wait to decide this issue until it is squarely presented. We therefore affirm the district court's denial of Penthouse's request for a declaratory judgment.

* * * *

For the foregoing reasons, the district court's grant of summary judgment is affirmed.

It is so ordered.

RANDOLPH, *Circuit Judge, concurring*: I join in part III of the court's opinion affirming the district court's denial of declaratory relief, but concur only in the court's judgment that defendants are immune from liability. Plaintiffs have alleged that one Commissioner, in a telephone call to an official of Southland Corporation, conveyed a false statement about the Commission's findings for the purpose of inducing Southland to stop distributing *Penthouse* magazine. Although part II of the court's opinion suggests otherwise, I believe the First Amendment may well prohibit government officials from spreading false, derogatory information in order to interfere with a publisher's distribution of protected material. While this might require an inquiry into the official's motive, it is not unusual for a First Amendment violation to turn on whether governmental conduct was undertaken for the purpose of infringing on someone's speech. *See Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1974). I also do not think there would be any particular difficulty in drawing a line between cases in which an official has spoken the truth or perhaps made an inadvertent misstatement (*cf. Babbitt v. United Farm Workers*, 442 U.S. 289, 301 (1979)) and cases in which the official has engaged in intentional lying in order to bring about the injury. A ruling along these lines would, however, constitute new law. Like the majority, I cannot find any clearly established doctrine that the sort of governmental interference alleged here, which is analogous to the common law tort of "injurious falsehood" or malicious interference with a contractual relationship (*see* 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS 297 (1986); RESTATEMENT (SECOND) OF TORTS § 767 (1979)), violates the First Amendment. I therefore concur in the judgment that the defendants are immune from liability under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Order of the Court of Appeals for the District of Columbia Circuit, filed August 27, 1991, Amending the Prior Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5181 September Term, 1990

PENTHOUSE INTERNATIONAL, LTD.

Appellant

v.

EDWIN A. MEESE, III, Attorney General of the United States, *et al.*

Before: SILBERMAN, WILLIAMS and RANDOLPH, Circuit Judges

ORDER

On consideration of Appellant's Petition for Rehearing, it is

ORDERED, by the Court, that the Opinion for the Court filed by Circuit Judge Silberman on July 19, 1991 be, and hereby is, amended as follows:

Page 16, third line from the bottom, delete the entire sentence beginning: "Here we are faced with . . . ." Insert in lieu thereof: "Here we are faced with a constitutional issue of first impression—the scope of the government's right to speak where the government's speech discourages the constitutionally-protected speech of private citizens."

Per Curiam
For the Court:
Constance L. Dupre, Clerk

By: ROBERT A. BONNER
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
FILED AUG 27 1991
CONSTANCE L. DUPRE
CLERK

Orders of the Court of Appeals for the District of Columbia Circuit, filed September 24, 1991, denying petition for rehearing and suggestion for rehearing *en banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5181 September Term, 1991

CA 86-1515

PENTHOUSE INTERNATIONAL, LTD.

Appellant

v.

EDWIN A. MEESE, III, Attorney General of the United States, *et al.*

BEFORE: Silberman, Williams and Randolph, Circuit Judges

ORDER

Upon consideration of Appellant's Petition for Rehearing, filed August 19, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: Robert A. Bonner
Deputy Clerk

A statement of Circuit Judge Randolph is attached.

In its petition for rehearing, Penthouse argues that the alleged telephone call to a Southland Corporation official exceeded the scope of the Commission's authority; therefore, the Commissioner who supposedly made it could not defend on the ground of immunity regardless of whether the law establishing liability was clear at the time. The issue is new. In its briefs, Penthouse did not make such an argument with respect to the telephone call. I therefore vote to deny the petition for rehearing.

United States Court of Appeals
For the District of Columbia Circuit
FILED SEP 24 1991
CONSTANCE L. DUPRE
CLERK

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5181 September Term, 1991

CA 86-1515

PENTHOUSE INTERNATIONAL, LTD.

Appellant

v.

EDWIN A. MEESE, III, Attorney General of the United States, *et al.*

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

Appellant's Suggestion for Rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
FILED SEP 24 1991
CONSTANCE L. DUPRE
CLERK